

July 25, 1986

REPORT TO THE COMMITTEE ON TRANSPORTATION AND LAND USE
CARS PARKED "FOR SALE" ON PUBLIC STREETS

In the last six months this office and the City Traffic Engineer have received numerous requests for legislation and advice regarding the problem of cars parked on the public right of way with for sale signs on them. This matter has also been discussed at prior meetings of the Transportation and Land Use Committee as well as the Sign Code Task Force. The cars for sale problem is present in Rancho Bernardo, Tierrasanta, Rancho Penasquitos, and several other places.

In drafting legislation it is necessary to establish what is the problem the legislation is intended to rectify. The City Traffic Engineer has indicated that the defined problem areas are legal parking places and that in most cases there is not enough parking congestion to justify parking time restrictions. The issue of safety was raised in some prior communications, however, it now appears that all of the City departments concur that the vehicles do not pose a safety problem. Another issue is aesthetics. We can assume for the purposes of this report that the presence of the cars for sale poses primarily an aesthetic problem.

In the regulation of cars for sale, questions have also been raised about preemption of the field by the California Vehicle Code. This issue was addressed in a recent memorandum from this office. (Copy attached).

The major problem in any regulation of signs is the Constitutional issue of free speech.

First Amendment government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free

expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

City Council v. Taxpayers for Vincent, 466 U.S. 789, 80 L.Ed.2d 772, (1984).

Commercial speech is covered by the protections of the First Amendment, *Virginia Board of Pharmacy v. Virginia Consumers*, 425 U.S. 748, 48 L.Ed.2d 346, (1976). The courts have recognized that society has an interest in the free flow of commercial speech. For Sale signs have specifically been held to be protected forms of commercial speech, *Linmark Associates v. Willingboro*, 431 U.S. 85, 52 L.Ed.2d 155, (1977).

The place that is to be regulated is a public street. Public streets and sidewalks are a traditional forum for the communication of both commercial and noncommercial speech. Any regulation of access to this forum is subject to a high standard of review. *U.S. v. Grace*, 461 U.S. 171, 75 L.Ed.2d 736, (1983). While the City currently prohibits signs affixed to public property within the public right of way, there is no such restriction on vehicles. In fact, the automobile has become a common method of communication of ideas. The City also allows considerable commercial activity and advertising within the right of way. Sidewalk cafes, pushcarts, hot food trucks, bus bench ads, ice cream trucks, buses, taxis, etc.

Given this background, we will review the several alternative legislative programs we have evaluated regarding solution of this problem.

1. An ordinance simply prohibiting the parking of cars for sale.

This is the same type statute that was struck down in the case of *People v. Moon*, 89 Cal.App.3d, Supp. 1, (1979). The Court in *Moon* held that in balancing the aesthetics of vehicles with for sale signs against the constitutional issues of free speech, the first amendment prevails. The Court also indicated that a regulation which goes to the content of the communication is a problem, citing *Linmark*, supra.

2. Regulations based on time, place, and manner.

A regulation limited upon time, place, and manner, is a proper method of regulation of speech. The regulations must be content neutral, clear, and evenly enforced. There must be some compelling state interest achieved by the regulation.

The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. Our cases make clear that in assessing

the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legitimate interest. (Emphasis added).

Schad v. Mt. Ephraim, 452 U.S. 61, 68 L.Ed.2d 671, (1981).

To pass the Schad test, any regulation of a "For Sale" sign would have to show that the presence of the sign was basically incompatible with the normal activity of a public street. The signs on the MTDB buses, the pizza delivery truck, the pest exterminator's little man with a hammer are all now normally compatible with a public street and all are more visually intrusive than a "For Sale" sign. To regulate the "For Sale" sign with a content neutral ordinance we should address the other commercial ideas being communicated from the street. Any attempt to regulate all of the commercial communication from a street would have serious practical and legal problems.

3. Parking Prohibitions or Time Restrictions.

From a legal perspective red curbs and two hour time limits are acceptable. The City Traffic Engineer may have administrative problems with these restrictions.

Parking meters are also legal regulatory controls for traffic. The Traffic Engineer concurs that they are proper traffic regulators. If meters are employed cost would be a problem. The Engineering Department reports that meters would cost approximately \$500.00 each to purchase and install and they will generate little income.

4. The committee consultant requested that we analyze the concept of regulating sales activities in the right-of-way.

There are two potential types of regulation, a permit system or a prohibition. An outright ban of all sales and storage in the public right-of-way may control the vehicle for sale problem but create many more problems. A content neutral prohibition would eliminate pushcarts, hot and cold food service trucks, taxicabs, ice cream trucks etc. This would be impractical. The permit system would avoid some of the problems of an outright prohibition but has problems of its own. When permits are to be issued, the owners of vehicles for sale would be able to obtain permits since the sale of vehicles is a legal activity. As with any permit system, the permits must be issued based upon clear, objective non-discriminatory standards. The permit process itself would be a very large administrative problem. The problems created by a permit process may be greater than the

problem you are trying to solve.

There are two enforcement problems with the regulation of sales by permit method of control. To prove that a violation has occurred you would need to establish that the vehicle was being held out for sale and not being incidentally parked there. To issue a citation would normally require that the citing officer observe the owner parking the car or conducting some sales activity since a misdemeanor must be committed in the officer's presence. A notify warrant process could also be utilized, however, the owner responsibility sections of the Vehicle Code only extend owner responsibility to local ordinances enacted pursuant to the Vehicle Code.

It is also possible, since the purpose of the permit system is to regulate protected speech, that it would be struck down as in the Berkely Ordinance in Moon. The administrative problems associated with this proposal will have to be addressed by the City Manager.

5. A "San Francisco" ordinance.

It was pointed out to this office that the City of San Francisco had recently promulgated an ordinance which would restrict the sale of cars based upon certain conditions. In our recent discussions with the City Attorney's office in San Francisco, they have indicated that the ordinance is undergoing further review and is not currently being enforced.

6. A planned district as a basis for regulation.

We were asked to evaluate whether the presence of a planned district such as Rancho Bernardo created a basis for regulation of cars for sale. The planned district ordinances of the City regulate primarily in the area of private land use. They are an expanded form of aesthetic control of land use. We do not feel that this type of regulation would rise to the level necessary to overcome the substantial constitutional tests that must be met. A very high level of aesthetics is still a lower threshold than a constitutionally protected communication.

We hope this memorandum has provided you with an indication of the options and the problems associated with regulating in this complex area.

Respectfully submitted,
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City Attorney

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